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No. 85-1754

In the
Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS BOBER, et al.,
Appellants,

vs.

WALGREEN CO., et al.,
Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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The Scheffer Press, Inc.—(312) 263-6850

QUESTION PRESENTED

1. Does a state statute which regulates the sale of alcoholic beverages and contains a requirement that twenty-five percent of the legal voters in a precinct must sign a petition to initiate a binding referendum on banning the sale of alcoholic beverages in that precinct violate the First and Fourteenth Amendments to the United States Constitution?

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The Appellees Klass Brake, Inc., Louise Showman, d/b/a The Hideaway Lounge, Lewis H. Windon, d/b/a The Note, Autumn Leaves, Inc., and Mohamad Khalil, its President, Reservation Inn, Inc., d/b/a My Place and Robert Willnow, its President (hereinafter "Appellees") move this Court pursuant to Rule 16 to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Illinois on the ground that it is manifest that the question on which the decision of the cause depends is so insubstantial as not to need further argument. The Supreme Court of Illinois correctly held that Ill. Rev. Stat. Ch. 43 Sec. 167 (1985) of the Illinois Liquor Control Act does not deprive voters of equal protection nor impinge upon their First Amendment rights.

Further Appellees adopt as their own the arguments raised in the Motion to Dismiss of the Appellee, Walgreen Co. heretofore filed with the Court.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of a provision of the Illinois Liquor Control Act (hereinafter the "Act") Ill. Rev. Stat. Ch. 43 Sec. 167 (1985). The Act was promulgated in order to regulate the sale in Illinois of alcoholic beverages. Each of the States in the Union has enacted a statute for that purpose.

Section 167 of the Act provides that a referendum election can be held to decide whether a precinct will be "wet" or "dry" if, and only if, twenty-five percent of the legal voters in the precinct sign a petition asking that the question be placed on the ballot.

B. The Proceedings Below

The Appellees are liquor licensees who were successful in judicially resisting the attempt of petitioners (Appellants herein) in three precincts to place on the ballot of the general election of November 6, 1984 the question of whether or not the three precincts would remain wet. The Circuit Court of Cook County, Illinois granted Appellees' Motions for Summary Judgment in the cases wherein the validity of the petitions were challenged. The court held that the petitioners had failed to satisfy the twenty-five percent signature requirement and, hence, the referendum would not appear on the ballot.

On October 29, 1984, Appellants then instituted a separate action in the United States District Court for the Northern District of Illinois seeking to declare Section 167 of the Act unconstitutional. The District Court declined to hear the cases based upon the doctrine of abstention. The case was reassigned to the Circuit Court of Cook County.

The Circuit Court after oral argument of counsel, but with no evidence of any kind being presented, held that the twenty-five percent signature requirement violated the First and Fourteenth Amendments to the United States Constitution; vacated the prior orders of summary judgment in favor of Appellees; declared that the signature requirement would, from that point on, be ten percent; and ordered that the referenda be placed on the ballot in the three precincts in question.

The general election was held on November 6, 1984 and the three precincts in question were voted dry.

Appellees instituted an appeal directly to the Supreme Court of Illinois which reversed the lower court and held that the twenty-five percent signature requirement "did not deprive voters of equal protection nor impinge upon their first amendment rights to contribute funds, advertise, or associate with other voters in support of a referendum." (Bober J.S. at 7a.)[1] The Illinois Supreme Court further ordered that the Circuit Court enter judgment holding the petitions and referenda invalid.

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[1] The abbreviation "Bober J.S." refers to the Jurisdictional Statements filed by Appellants Dennis Bober, et al.

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

Liquor destined for use and consumption within a state is constitutionally unique in that Section Two of the Twenty-First Amendment is the only presently operative portion of the Constitution which this Court has construed as granting power to the states to regulate an industry. Kamenshine, *California* v. *LaRue*: *The Twenty-First Amendment as a Preferred Power,* 26 Vand. L.Rev. 1035, 1039 (1979). There is significant legal history supporting the notion of state primacy in regulating liquor.

On January 16, 1919, the Eighteenth Amendment was ratified thereby creating prohibition. However, in December, 1933 the Twenty-First Amendment was ratified which not only repealed the Eighteenth Amendment, but also conferred extraordinary powers on the states to regulate this single article of commerce—intoxicating liquor.

The intent of Congress to divest itself of primary regulatory power in favor of state control of the beverage alcohol industry relative to matters within the State is best seen by the elimination of Section Three of the initial constitutional amendment introduced for ratification. Section Three provided for concurrent federal and state power to regulate or prohibit the sale of intoxicating liquors. Therefore, the elimination of Section Three is a clear indication of Congress' intention to delegate to the states the primary regulatory power.

Based upon the express grant of authority to the states to regulate the sale of liquor, each of the fifty states enacted a statute governing the sale of alcoholic beverages.[2] The State of Illinois has operated pursuant to the Act since 1934 which is itself indicative of the fact that Illinois' public policy is one which favors legalizing the sale of alcoholic beverages. The Illinois legislature has been free all of these years to modify the twenty-five percent signature requirement in favor of a lesser percentage or to eliminate it altogether, but it chose not to. Rather, it chose to enact a method which promotes the aforesaid public policy and which intentionally makes difficult the method of prohibiting the sale of liquor. It is important to note that the same twenty-five percent signature requirement also applies to those wishing to vote on permitting the sale of liquor in what currently may be a dry precinct. Thus, the standard is the same for both proponents and opponents of the sale of alcoholic beverages.

In point of fact, the twenty-five percent requirement has fairly served the public interest since greater than ten percent of Chicago's precincts have been voted dry.[3]

The Circuit Court wrongfully imposed its will upon the people of the State of Illinois. Despite the clear delegation of power to the states to regulate this unique industry and despite the well established separation of powers

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[2] Appellants have set forth an Appendix wherein each State is listed with reference to the percentage requirement for access to the ballot. Thirty-six states provide for local option elections.

[3] Precinct boundaries contained on the Ward maps which are under the custody and control of the Board of Election Commission of the City of Chicago. (Public records.)

doctrine, the lower court declared the twenty-five percent signature requirement unconstitutional and inserted a ten percent requirement on its own. The ten percent requirement was borrowed from a provision of the Illinois Election Code which deals with advisory non-binding referenda. A clearer case for the usurpation of legislative power could not be fashioned.

Appellants have applauded the Circuit Court's order and stated that:

> "The Circuit Court of Cook County faced the hard choice of balancing the interest of the state and its citizens. The trial court's determination that a ten percent signature requirement served the interests of both the voters and the state was a carefully-reasoned exercise in judicial analysis and decision-making." (Bober J.S at page 10.)

What Appellants and the trial court fail to realize is that it is not within a trial court's province to legislate; the decision was not its to make. The Twenty-First Amendment makes it abundantly clear that the states are to regulate the liquor industry. The State of Illinois has done so and until it adopts a different policy, the Circuit Court cannot thrust its own notions of lawmaking upon the citizens of the State. The trial court ventured into an area reserved to the legislature and absent a showing that the Act will deprive the complaining class of its constitutional guarantees, the Act should be modified or eliminated only by elected lawmakers. Such a showing was not made before the trial court. Further, it is not within the province of the courts to legislate public policy. *State of Minnesota* v. *Clover Leaf Company,* 449 U.S. 456 (1981); *Seagram* v. *Hostetter,* 384 U.S. 35 (1966).

The Illinois legislature, fifty-two years ago, determined that a twenty-five percent signature requirement served the interests of the voters and the state. It did so pursuant to the Twenty-First Amendment. Appellants have virtually ignored the legitimate and constitutionally mandated interest that the states have in regulating the sale of alcoholic beverages. The Supreme Court of Illinois upheld and vindicated that interest by reversing the lower court's order.

Finally, although Appellants have adopted the mistaken position that this cause is not governed by the Twenty-First Amendment, it is important to remember that in an abundance of cases, the Twenty-First Amendment has prevailed when in conflict with the First and Fourteenth Amendment. See *Dunagin and Lamar Outdoor Advertising* v. *The City of Oxford, Mississippi and Mississippi Tax Commission*, 718 F.2d 738 (5th Cir. 1984); *Queensgate Investment Co., d/b/a Holiday Inn* v. *Liquor Control Commission*, 69 Ohio 2d 361, 433 N.E.2d 138 (1982); *Ziffrin, Inc.* v. *Reese*, 308 U.S. 132 (1939); and *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 391 (1939).

Therefore, Illinois has enacted legislation pursuant to the Twenty-First Amendment which legislation furthers the State's interest in the sale of alcoholic beverages and the First and Fourteenth Amendments must be applied to the statute in that context. It is precisely in that context that the Illinois Supreme Court held that the trial court erred in declaring the twenty-five percent signature requirement of the Act unconstitutional.

III.

CONCLUSION

The Appellees respectfully submit that the question upon which this cause depends is so insubstantial as not to need further argument and move this Court to dismiss this appeal In the alternative, Appellees respectfully move this Court to affirm the decision of the Supreme Court of Illinois that Section 167 of the Act is not violative of the First and Fourteenth Amendments.

Respectfully submitted,

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APPENDIX

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TATE	LOCAL OPTION ELECTION LEGISLATION	PERCENTAGE REQUIREMENT FOR ACCESS TO BALLOT/ CITATION	POLITICAL SUBDIVISION EFFECTED BY VOTE
Alabama	Yes	25% / Ala. Code § 28-2-1 (1975)	County
Alaska	Yes	35% / Alaska Sta. § 04.11.502 (1980)	Municipality
Arizona	No	N/A	N/A
Arkansas	Yes	15% / Ark. Stat. Ann. § 48-801 (1977)	County
California	No	N/A	N/A
Colorado	Yes	15% / Colo. Rev. Stat. § 12-47-140 (1978)	Municipality, City or County
Connecticut	Yes	10% / Conn. Gen. Stat. Ann. § 30-10 (1975)	Town
Delaware	No	N/A	N/A
District of Columbia	No	N/A	N/A
Florida	Yes	25% / Fla. Stat. Ann. § 567.01 (West 1962)	County
Georgia	Yes	35% / Ga. Code Ann. § 3-4-41 (1982)	Municipality or County
Hawaii	No	N/A	N/A
Idaho	Yes	20% / Idaho Code § 23-1304(1977)	City or Village

STATE	LOCAL OPTION ELECTION LEGISLATION	PERCENTAGE REQUIREMENT FOR ACCESS TO BALLOT/ CITATION	POLITICAL SUBDIVISION EFFECTED BY VOTE
Illinois *	Yes	25% / Ill. Rev. Stat. Ch. 43, § 9 (1983)	Precinct
Indiana	No	N/A	N/A
Iowa	No	N/A	N/A
Kansas	Yes	30 - 40% / Kan. Stat. Ann. § 41-302 (1981)	City
Kentucky	Yes	25% / Ky. Rev. Stat. § 242.020 – (1980)	County, City, Town or Precinct
Louisiana	Yes	25% / La. Rev. Stat. § 582 (West 1975)	Parish, Ward, or Incorporated Municipalit
Maine	Yes	15% / Me. Rev. Stat. Ann. tit. 28, § 101 (1974)	City, Town or Plantatior
Maryland	NO	N/A	N/A
Massachusetts	Yes	10% / Mass. Gen. Laws Ann. Ch. 138, §11 (West 1974)	Town or City
Michigan	yes	35% / Mich. Comp. Laws Ann. § 436.56 (West 1978)	City or Township
Minnesota	Yes	30% or 200, which ever is less Minn. Stat. Ann. § 340.20 (West 1972)	City
Mississippi	Yes	20% or 1500, whichever is less Miss. Sta. Ann. § 67-1-11 (1972)	County

STATE	LOCAL OPTION ELECTION LEGISLATION	PERCENTAGE REQUIREMENT FOR ACCESS TO BALLOT/ CITATION	POLITICAL SUBDIVISION EFFECTED BY VOTE
Missouri	Yes	20% Mo. Ann. Stat. § 311.110 (Vernon 1963)	City
Montana	No	N/A	N/A
Nebraska	Yes	20% / Neb. Rev. Stat. § 53-122 (1978)	City or Village
Nevada	No	N/A	N/A
New Hampshire	Yes	10% / N.H. Rev. Stat. Ann. § 179:1 (1978)	City or Town
New Jersey	Yes	15% / N.J. Stat. Ann. § 33:1-45 (West 1940)	Municipality
New Mexico	Yes	5% / N.M. Stat. Ann. § 60-5A-1	District
New York	Yes	25% / N.Y. Alco. Bev. Cont. Law 141 (McKinney 1970)	Town or City
North Carolina	Yes	25% / N.C. Gen. Stat. § 18B-601 (1983)	County or City
North Dakota	No	N/A	N/A
Ohio	Yes	35% / Ohio Rev. Code Ann. § 4301.33 (Page 1982)	District
Oklahoma	No	N/A	N/A
Oregon	Yes	10% / Or. Rev. Stat. § 471.506 (1983)	City or County
Pennsylvania	Yes	25 % / Pa. Stat. Ann. tit. 47, § 4-472 (Purdon 1969)	Municipality
Rhode Island	Yes	10 - 15% / R.I. Gen. Laws Laws §3-5-2 (1976)	City or Town

STATE	LOCAL OPTION ELECTION LEGISLATION	PERCENTAGE REQUIREMENT FOR ACCESS TO BALLOT/ CITATION	POLITICAL SUBDIVISION EFFECTED BY VOTE
South Carolina	No	N/A	N/A
South Dakota	Yes	15% / S.D. Codified Laws § 35-3-8 (1977)	Municipality or Township
Tennessee	Yes	10% / Tenn. Code Ann. § 57-3-106 (1980)	County or Municipality
Texas	Yes	35% / Tex. Alco. Bev. Code Ann. § 251.11 (Vernon 1978)	County, Justice, Precinc Town or City
Utah	No	N/A	N/A
Vermont	Yes	5% / Vt.Stat. Ann. tit. 7 § 161 (1972))	Town
Virginia	Yes	10% / but no less than 100/ Va. Code § 4-45 (1983)	County, City or Town
Washington	Yes	30% / Wash. Rev. Code Ann. § 66.40.040 (1962)	City or Town
West Virginia	Yes	5% / W.V. Code § 60-5-2 (1984)	County, District or Municipality
Wisconsin	Yes	15% / Wis. Stat. Ann. § 125.05 (West 1984)	Municipality
Wyoming	No	N/A	N/A

* Prior to entry of Orders Appealed from

SUMMARY OF THE ABOVE

1. Of the 50 states together with the District of Columbia 36 have local option election legislation.

2. Of those 36 states with legislation, 89% deal with political subdivisions larger than a precinct classification:

   (a) 33-⅓% of these states require signatures of 25% or more.

   (b) 39% of the states require signatures of 20% or more.

3. The States of Texas, Kentucky and Louisiana are the only other states which allow local option elections in a political subdivision as small as a precinct. Yet these states require signatures of 25% to 35%.